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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

NO. 73-842

LARRY DONALD BAILEY,
Petitioner

-v.-

STATE OF NORTH CAROLINA,
Respondent

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Petitioner's conviction in Hertford County Superior Court was affirmed by the North Carolina Court of Appeals and the Supreme Court of North Carolina denied an appeal and his Petition for Writ of Certiorari. Grom the decision of the Supreme Court of North Carolina, petitioner has filed this Petition for Writ of Certiorari to the Supreme Court of North Carolina.

Copies of the above orders are appended to the petitioner' petition before this Court.

JURISDICTION

Jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION

I. DID THE METHOD AND MANNER BY WHICH THE TRIAL COURT DENIED THE PETITIONER'S MOTION FOR A BILL OF PARTICULARS CONSTITUTE TRIAL IN ABSENTIA OR A DENIAL OF DUE PROCESS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE GENERAL STATUTES OF NORTH CAROLINA

SECTION 15-155.4

In general.–In all criminal cases before the superior court, the superior court judge assigned to hold the courts of the district wherein the case is pending, or the resident superior court judge of the district, shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense; and such judge shall for good cause shown and regardless of any objection of the solicitor or other counsel for the State, direct that the accused or his counsel be permitted to examine before any clerk of superior court, or any other person designated by the judge for the purpose, any expert witnesses to be offered by the State in the trial of the case regarding the proposed testimony of such expert witnesses.

Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit or the examination of any expert witness under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one or more specifically identified exhibits or the examination of a specific expert witness and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days.

STATEMENT OF THE CASE

The defendant petitioner, Larry Donald Bailey, was tried and convicted in Hertford County Superior Court upon an indictment for breaking and entering and for larceny. Preliminary to the actual trial, defendant through counsel pursuant to General Statute

15-155.4, made a motion addressed to the Court's discretion for a Bill of Particulars. That motion was denied by the trial court and later formalized in an order of the Court. Upon trial on the merits, the jury later returned a verdict of guilty upon both counts against the defendant, and from a judgment within the maximum allowed at law, the defendant perfected an appeal to the North Carolina Court of Appeals whereupon his conviction was confirmed. From an order of the North Carolina Supreme Court denying defendant's Petition for Writ of Certiorari, and from an order dismissing his appeal, the petitioner now seeks the issuance of the Writ of Certiorari by the Supreme Court of the United States.

ARGUMENT

I. THE METHOD AND MANNER BY WHICH THE TRIAL COURT DENIED THE DEFENDANT'S MOTION FOR A BILL OF PARTICULARS DID NOT CONSTITUTE TRIAL IN ABSENTIA AND WAS NOT A DENIAL OF DUE PROCESS.

The following sequence of events fails to support petitioner's claims of constitutional deprivations:

The defendant, pursuant to G.S. 15-155.4 petitioned the trial court for the granting of a Bill of Particulars which under North Carolina law is addressed to the discretion of the trial court and a denial thereof is not subject to judicial review except upon a showing of gross abuse of discretion. The function of the Bill of Particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). The defendant's Bill of Particulars contained 41 very broad and detailed questions.

On pages 70 and 71 of the Record, it is clearly shown that the petitioner, before entering his plea to the charges against him, requested the trial court to be heard on his motion "out of the presence and hearing of all prospective jury veniremen ... whereupon the court, solicitor for the State of North Carolina, the official court reporter, along with counsel for the defendant ... retired to the Grand Jury Room for the hearing and determination of the defendant's written and oral motions out of the hearing of any

prospective jurors." Then the trial court, after deliberation, denied the defendant's motion for a Bill of Particulars, directed counsel for the defendant to retire from the Grand Jury Room, and while still in the presence of the court reporter and the solicitor, drafted an Order formally denying the defendant's motion for a Bill of Particulars.

It is barely short of fantastic that upon this series of events, the defendant can now be heard to contend that he was unconstitutionally denied the presence of counsel at all stages of his trial. It was the defendant's counsel who requested that the determination upon his motion be considered outside the presence of the jury. The trial court ruled aginst the motion in the presence of defendant's counsel. After defendant's counsel retired, the solicitor and court reporter remained merely while the Order, formally denying said motion, was drawn by the trial court. From a merely routine, clerical standpoint, the Order itself was composed in the defendant's absence, but substantively speaking, the actual decision on the merits of petitioner's motion had been made before defendant's counsel. There is manifestly nothing in the Record to indicate that the solicitor said anything in an attempt to prejudice the defendant after the withdrawal of defendant's counsel, but practically speaking, this in itself would have been an impossibility, since the whole proceeding, at defendant's request, had transpired *outside* the presence of the jury. The trial court's order related only to the petitioner's pretrial motion for a Bill of Particulars and was never relayed in any manner to the jury.

The petitioner was free to take exception to the denial of his motion by the trial court, and which he subsequently did. But it stretches credulity, by any standard of imagination, to seriously contend that these series of events constituted impermissible constitutional conduct by the State of North Carolina or "trial in absentia".

CONCLUSION

The respondent requests that for the above reasons, the petition for certiorari be denied.

Respectfully submitted,

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Respectfully submitted,

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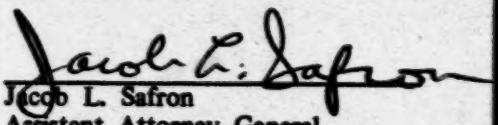
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of February, 1974, a copy of the foregoing Brief for the Respondent in opposition was mailed, postage prepaid, to Messers Leonidas Herbin, Jr., P. O. Box 109, Ahoskie, North Carolina, 27910 and Gerald F. White, P. O. Box 304, Elizabeth City, North Carolina, 27909.



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